

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MONOLITHIC POWER SYSTEMS, INC.,  
Plaintiff,  
v.  
O2 MICRO INTERNATIONAL LIMITED,  
Defendant.

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O2 MICRO INTERNATIONAL LIMITED,  
Counterclaimant,  
v.  
MONOLITHIC POWER SYSTEMS, INC.;  
ASUSTEK COMPUTER INC.; ASUSTEK  
COMPUTER INTERNATIONAL AMERICA,  
Counterclaim-Defendants.

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No. C 08-04567 CW

ORDER GRANTING  
MOTION TO STRIKE  
PORTIONS OF THE  
EXPERT REPORTS OF  
RICHARD A. FLASCK  
AND VINCENT E.  
O'BRIEN (Docket No.  
143) AND GRANTING IN  
PART AND DENYING IN  
PART O2 MICRO'S  
MOTION FOR LEAVE TO  
AMEND ITS DISCLOSURE  
OF ASSERTED CLAIMS  
AND PRELIMINARY  
INFRINGEMENT  
CONTENTIONS (Docket  
No. 146)

Plaintiff and Counter-Defendant Monolithic Power Systems, Inc. (MPS) moves to strike portions of the expert reports of Richard A. Flasck and Vincent E. O'Brien. Counterclaim-Defendants ASUSTeK Computer, Inc. and ASUSTeK Computer International America (collectively ASUSTeK) join MPS' motion. Defendant O2 Micro International Limited opposes the motion. In a related motion, O2 Micro moves to amend its disclosure of asserted claims and preliminary infringement contentions to include the alleged infringements discussed in the Flasck and O'Brien reports. MPS and

1 ASUSTeK oppose the motion in part. The motions were decided on the  
2 papers. Having considered all of the papers submitted by the  
3 parties, the Court GRANTS MPS' Motion to Strike Portions of the  
4 Flasck and O'Brien Reports and GRANTS IN PART AND DENIES IN PART O2  
5 Micro's Motion to Amend.

6 BACKGROUND

7 On January 28, 2009, O2 Micro filed a counterclaim against MPS  
8 for infringement of U.S. Patent No. 7,417,382 (the '382 Patent).  
9 Pursuant to Patent Local Rule 3-1, O2 Micro served MPS with its  
10 Disclosure of Asserted Claims and Preliminary Infringement  
11 Contentions on March 13, 2009. The Preliminary Infringement  
12 Contentions alleged that MPS' MP1009, MP1010B, MP1026, MP1038 and  
13 MP1048 inverter controllers infringe the '382 Patent.

14 On July 31, 2009, O2 Micro served MPS with the expert report  
15 of Richard A. Flasck. In the report, Flasck opined that the MPS  
16 products mentioned above infringe the '382 Patent. He also opined  
17 that MPS' MP1008, MP10091, MP1015, MP1016, MP1017, MP1018, MP1028,  
18 MP1037, MP1060, MP1872 and MP61093 products infringe the '382  
19 Patent. O2 Micro did not address these eleven additional products  
20 in their Preliminary Infringement Contentions. On August 21, 2009,  
21 O2 Micro served MPS with an expert report by Vincent E. O'Brien,  
22 which estimated the damages caused by MPS' alleged infringement.  
23 The O'Brien Report took into account the eleven additional MPS  
24 products discussed in the Flasck Report. The same day, O2 Micro  
25 also served a supplement to the Flasck Report, which opined that  
26 MPS' MP1061, MP1062, VN800 and VN830 products also infringe the  
27 '382 Patent.

28 On September 4, 2009, MPS filed this motion to strike the

1 portions of the Flasck and O'Brien reports that address the  
2 additional products not discussed in O2 Micro's Preliminary  
3 Infringement Contentions. Later that day, O2 Micro filed a motion  
4 to amend its infringement contentions to include the additional  
5 eleven MPS products from the original Flasck Report and the four  
6 others discussed in the Supplemental Flasck Report. O2 Micro's  
7 motion to amend also seeks leave to withdraw O2 Micro's allegations  
8 against BenQ Corporation and BenQ America Corp. and its claims of  
9 infringement of U.S. Patent Nos. 6,856,519, 6,809,938 and  
10 7,120,035.<sup>1</sup> MPS and ASUSTeK did not oppose this portion of the  
11 motion.

12 The Court's Case Management Order required the close of claim  
13 construction discovery by July 27, 2009, the disclosure of expert  
14 witnesses' identities and reports by July 31, 2009, disclosure of  
15 expert rebuttal reports by August 14 and the close of fact and  
16 expert discovery by August 31.<sup>2</sup> (Docket No. 60.)

17 DISCUSSION

18 I. O2 Micro's Motion to Amend

19 This district has adopted Patent Local Rules that "require  
20 parties to state early in the litigation and with specificity their  
21 contentions with respect to infringement and invalidity." O2 Micro  
22 Int'l, Ltd. v. Monolithic Power Systems, Inc., 467 F.3d 1355, 1359  
23 (Fed. Cir. 2006). Under the Patent Local Rules, the parties'

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24  
25 <sup>1</sup> Pursuant to stipulation, all claims against BenQ Corporation  
26 and BenQ America Corp. were dismissed. (Docket No. 98). The  
claims of infringement of the '519, '938 and '035 patents were also  
dismissed pursuant to stipulation. (Docket No. 100).

27 <sup>2</sup> This Order was amended pursuant to stipulation on August 17,  
28 2009. However, the changes only addressed discovery and briefing  
regarding O2 Micro's prayer for damages. (Docket Nos. 111, 115.)

1 ability to amend their infringement and invalidity contentions is  
2 restricted. Patent Local Rule 3-6 provides that amendment to  
3 infringement contentions "may be made only by order of the Court  
4 upon a timely showing of good cause." Examples of good cause  
5 include

6 (a) a claim construction by the Court different from that  
7 proposed by the party seeking amendment; (b) recent  
8 discovery of material, prior art despite earlier diligent  
9 search; and (c) recent discovery of nonpublic information  
about the Accused Instrumentality which was not  
discovered, despite diligent efforts, before the service  
of the Infringement Contentions.

10 Patent Local R. 3-6. Good cause requires a showing of diligence;  
11 the burden is on the party seeking to amend its contentions "to  
12 establish diligence rather than on the opposing party to establish  
13 a lack of diligence." O2 Micro, 467 F.3d at 1366-67.

14 O2 Micro argues that good cause exists to add the fifteen  
15 additional MPS products because it only recently discovered non-  
16 public information about them. MPS points out, however, that O2  
17 Micro obtained information on the MP1008, MP1015, MP1016, MP1017,  
18 MP1018, MP1028, MP1037, MP1060, MP1872, VN800 and VN830 through  
19 either its patent litigation in the Eastern District of Texas<sup>3</sup> or  
20 the 2004 case against MPS in this Court regarding infringement of  
21 its U.S. Patent No. 6,396,722. With regard to the MP1061, MP1062,  
22 MP10091 and MP61093, MPS asserts that O2 Micro received information  
23 on these products through the parallel International Trade  
24 Commission proceeding in May and June, 2009. All discovery in the  
25 ITC action applies to this proceeding. (Docket No. 60.) O2 Micro

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27 <sup>3</sup> See O2 Micro Int'l Ltd. v. Samsung Elecs. Co., No. 2:04-cv-  
28 00323 TJW (E.D. Tex.); O2 Micro Int'l Ltd. v. Monolithic Power  
Sys., Inc., No. 2:04-cv-00359 LED (E.D. Tex.); O2 Micro Int'l Ltd.  
v. Hon Hai Precision Indus. Co., No. 2:05-cv-00323-CE (E.D. Tex.).

1 did not persuasively argue or provide evidence showing that it did  
2 not receive information from these other proceedings.<sup>4</sup>

3 Because O2 Micro was not diligent in seeking leave to amend,  
4 the Court does not find good cause for O2 Micro to add these  
5 products. O2 Micro had information, often in the form of detailed  
6 technical documents, on the MP1008, MP1015, MP1016, MP1017, MP1018,  
7 MP1028, MP1037, MP1060, MP1872, VN800 and VN830. Thus, these  
8 products could have been included in its March, 2009 Infringement  
9 Contentions. O2 Micro asserts that protective orders barred it  
10 from using information obtained in prior actions. This argument  
11 ignores provisions in the protective orders that allow O2 Micro to  
12 seek consent to use the information in this case. See, e.g.,  
13 Harkins Decl. in Opp'n to Mot. to Strike, Ex. C at 4. There is no  
14 evidence that O2 Micro sought such consent.

15 As for the MP1061, MP1062, MP10091 and MP61093, O2 Micro had  
16 information on these products about three months before it filed  
17 its current motion. Nevertheless, O2 Micro waited until after  
18 discovery closed before seeking leave to accuse them. Indeed, MPS  
19 did not have notice that O2 Micro would accuse the MP1061 and  
20 MP1062 until O2 Micro served the Supplemental Flasck Report on

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21  
22 <sup>4</sup> Concerning the MP1008, MP10091 and MP61093, O2 Micro asserts  
23 that MPS "cited no evidence whatsoever to support its allegation  
24 that O2 Micro was aware of the products at the time it served its  
25 March 13, 2009 infringement contentions." O2 Micro Opp'n to Mot.  
26 to Strike at 6. This assertion is partially incorrect. MPS  
27 provided evidence showing O2 Micro knew of the MP1008 as early as  
28 November 5, 2007. See Kang Dec'l, Opp'n to Mot. for Leave to  
Amend, Ex. K. As for the MP10091 and MP61093, MPS provided  
evidence showing that O2 Micro received information on these  
products in May, 2009 through the ITC proceeding. See Kang Dec'l,  
Reply in Support of Mot. to Strike ¶ 5. As discussed below,  
although O2 Micro received information about these products after  
March, 2009, it does not show it was diligent in seeking leave to  
amend its contentions.

1 August 21, three weeks after the deadline for disclosing expert  
2 reports had passed. The Court cannot disregard O2 Micro's  
3 tardiness, which limited the time MPS had to analyze the additional  
4 allegations. O2 Micro does not explain why it did not seek leave  
5 to amend sooner, and thus cannot be found to be diligent.

6 II. MPS' Motion to Strike

7 MPS moves to strike the portions of the Flasck and O'Brien  
8 reports that address the additional MPS products. MPS asserts that  
9 these references are improper because they are not mentioned in the  
10 Infringement Contentions. Because the Court denied O2 Micro's  
11 motion to amend, it grants this motion to strike.

12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS MPS' Motion to  
14 Strike. Within three days of this Order, O2 Micro shall serve  
15 versions of the Flasck and O'Brien reports that do not include  
16 references to the MP1008, MP1015, MP1016, MP1017, MP1018, MP1028,  
17 MP1037, MP1060, MP1061, MP1062, MP1872, MP10091, MP61093, VN800 and  
18 VN830 products. The Court GRANTS O2 Micro's Motion for Leave to  
19 Amend with regard to withdrawing allegations against BenQ  
20 Corporation and BenQ America Corp. and claims of infringement of  
21 U.S. Patent Nos. 6,856,519, 6,809,938 and 7,120,035. O2 Micro's  
22 request to include fifteen additional MPS products is DENIED. O2  
23 Micro shall serve its amended infringement contentions within three  
24 days of this Order.

25 IT IS SO ORDERED.

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27 Dated: 10/16/2009

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CLAUDIA WILKEN  
United States District Judge